

Instructions For Claims Under the Family and Medical Leave Act

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10.0 FMLA Introductory Instruction

Model

In this case the Plaintiff _____ has made a claim under the Family and Medical Leave Act, a Federal statute that prohibits an employer from interfering with or discriminating against an employee's exercise of the right granted in the Act to a period of unpaid leave [because of a serious health condition] [where necessary to care for a family member with a serious health condition] [because of the birth of a son or daughter] [because of the placement of a son or daughter with the employee for adoption or foster care].

Specifically, [plaintiff] claims that [describe plaintiff's claim of interference, discrimination, retaliation].

[Defendant] denies [describe defenses]. Further, [defendant] asserts that [describe any affirmative defenses].

I will now instruct you more fully on the issues that you must address in this case.

Comment

Referring to the parties by their names, rather than solely as "Plaintiff" and "Defendant," can improve jurors' comprehension. In these instructions, bracketed references to "[plaintiff]" or "[defendant]" indicate places where the name of the party should be inserted.

The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq., ("FMLA") was enacted to provide leave for workers whose personal or medical circumstances require that they take time off from work in excess of what their employers are willing or able to provide. *Victorelli v. Shadyside Hosp.*, 128 F.3d 184, 186 (3d Cir. 1997) (citing 29 C.F.R. § 825.101). The Act is intended "to balance the demands of the workplace with the needs of families ... by establishing a minimum labor standard for leave" that lets employees "take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition." *Churchill v. Star Enters.*, 183 F.3d 184, 192 (3d Cir. 1999) (quoting 29 U.S.C. § 2601(b)(1), (2)).

The FMLA guarantees eligible employees 12 weeks of leave in a 1-year period following certain events: a serious medical condition; a family member's serious illness; or the arrival of a new son or daughter. 29 U.S.C. § 2612(a)(1). During the 12 week leave period, the employer must maintain the employee's group health coverage. § 2614(c)(1). Leave must be granted, when "medically necessary," on an intermittent or part-time basis. § 2612(b)(1). Upon the employee's timely return, the employer must reinstate the employee to his or her former position or an

1 equivalent. § 2614(a)(1). The Act makes it unlawful for an employer to "interfere with, restrain, or
2 deny the exercise of" these rights, § 2615(a)(1); to discriminate against those who exercise their
3 rights under the Act, § 2615(a)(2); and to retaliate against those who file charges, give information,
4 or testify in any inquiry related to an assertion of rights under the Act, § 2615(b). Violators are
5 subject to payment of certain monetary damages and appropriate equitable relief, § 2617(a)(1). The
6 Act provides for liquidated (double) damages where wages or benefits have been denied in violation
7 of the Act, unless the defendant proves to the court that the violation was in good faith.

8 9 *Employers Covered by the FMLA*¹

10 A covered employer under the Act is one engaged in commerce or in an industry affecting
11 commerce who employs 50 or more employees for each working day during each of 20 or more
12 calendar workweeks in the current or preceding calendar year. 29 U.S.C. § 2611(4)(A); 29 C.F.R.
13 § 825.104(d). In addition, the Supreme Court has held that states are employers subject to the
14 FMLA. *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

15 *Employees Eligible for Leave*

16 Not all employees are entitled to leave under the FMLA. Before an employee can take leave
17 under the Act, the following eligibility requirements must be met: he or she must have been
18 employed by the employer for at least 12 months and must have worked at least 1,250 hours during
19 the previous 12-month period. 29 U.S.C. § 2611(2)(A). A husband and wife who are both eligible
20 for FMLA leave and are employed by the same covered employer may be limited by the employer
21 to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for 1) the
22 birth of the employee's son or daughter or to care for that newborn; 2) for placement of a son or
23 daughter for adoption or foster care, or to care for the child after placement; or 3) or to care for the
24 employee's parent. 29 C.F.R. § 825.202(a).

25 *Family Members Contemplated by the FMLA*

26 Employees are also eligible for leave when certain family members – his or her spouse, son,
27 daughter, or parent – have serious health conditions. "Spouse" means a husband or wife as defined
28 or recognized under state law where the employee resides, including common law spouses in states
29 where common law marriages are recognized. 29 U.S.C. 2611(13); 29 C.F.R. § 825.113.

30 Under the FMLA, a son or daughter means a biological, adopted or foster child, a stepchild,
31 a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or who is
32 age 18 or older but is incapable of self-care because of a mental or physical disability. 29 U.S.C. §
33 2611(12); 29 C.F.R. § 825.113(c). Persons with "in loco parentis" status under the FMLA include

¹ Much of the following analysis of the FMLA is adapted from the Comment to the Eighth Circuit Jury Instructions on FMLA claims, Instruction 5.80.

1 those who had day-to-day responsibility to care for and financially support the employee when the
2 employee was a child. 29 C.F.R. § 113(c)(3). “Incapable of self-care” means that the individual
3 requires active assistance or supervision to provide daily self-care in three or more of the activities
4 of daily living or instrumental activities of daily living. 29 C.F.R. § 825.113(c)(1). “Activities of
5 daily living” include adaptive activities such as caring appropriately for one’s grooming and hygiene,
6 bathing, dressing and eating. Id. “Instrumental activities of daily living” include cooking, cleaning,
7 shopping, taking public transportation, paying bills, maintaining a residence, using telephones and
8 directories, using a post office, etc. Id. “Physical or mental disability” means a physical or mental
9 impairment that substantially limits one or more of the major life activities of an individual. 29
10 C.F.R. § 825.113(c)(2). These terms are defined in the same manner as they are under the Americans
11 with Disabilities Act. Id.

12 “Parent” means a biological parent or an individual who stands or stood in loco parentis to
13 an employee when the employee was a son or daughter. 29 U.S.C. § 2611(7). The term “parent” does
14 not include grandparents or parents-in-law unless a grandparent or parent-in-law meets the in loco
15 parentis definition. 29 C.F.R. § 825.113(b).

16 *Leave for Birth, Adoption or Foster Care*

17 The FMLA permits an employee to take leave for the birth of the employee’s son or daughter
18 or to care for the child after birth, for placement of a son or daughter with the employee for adoption
19 or foster care, or to care for the child after placement. 29 U.S.C. § 2612(a); 29 C.F.R. § 825.100. The
20 right to take leave under the FMLA applies equally to male and female employees. A father as well
21 as a mother can take family leave for the birth, placement for adoption, or foster care of a child. 29
22 C.F.R. § 825.112(b). Circumstances may require that the FMLA leave begin before the actual date
23 of the birth of a child or the actual placement for adoption of a child. For example, an expectant
24 mother may need to be absent from work for prenatal care, or her condition may make her unable
25 to work. In addition, if an absence from work is required for the placement for adoption or foster care
26 to proceed, the employee is entitled to FMLA leave. 29 C.F.R. § 825.112(c)-(d).

27 An employee’s entitlement to leave for a birth or placement for adoption or foster care
28 expires at the end of the 12-month period beginning on the date of the birth or placement unless state
29 law allows, or the employer permits, leave to be taken for a longer period. 29 C.F.R. § 825.201. Any
30 such FMLA leave must be concluded during this one-year period. Id. An employee is not required
31 to designate whether the leave the employee is taking is FMLA leave. 29 C.F.R. § 825.701.

32 *What Constitutes a “Serious Health Condition?”*

33 The concept of “serious health condition” was meant to be construed broadly, so that the
34 FMLA’s provisions are interpreted to effect the Act’s remedial purpose. *Stekloff v. St. John’s Mercy*
35 *Health Systems*, 218 F.3d 858, 862 (8th Cir. 2000). The phrase is defined in the regulations as an
36 illness, injury, impairment or physical or mental condition that involves inpatient care, a period of
37 incapacity combined with treatment by a health care provider, pregnancy or prenatal care, chronic

1 conditions, long-term incapacitating conditions, and conditions requiring multiple treatments. 29
2 C.F.R. § 825.114(a).

3 Specifically, inpatient care means an overnight stay in a hospital, hospice, or residential
4 medical care facility, including any period of incapacity (inability to work, attend school or perform
5 other regular daily activities), or any subsequent treatment in connection with the inpatient care. 29
6 C.F.R. § 825.114(a)(1).

7 Incapacity plus treatment means a period of incapacity (inability to work, attend school or
8 perform other regular daily activities) of more than three consecutive days, including any subsequent
9 treatment or period of incapacity relating to the same condition, that also involves: 1) treatment two
10 or more times by a health care provider, by a nurse or physician's assistant under direct supervision
11 of a health care provider, or by a provider of health services (for example, a physical therapist) under
12 orders of, or on referral by, a health care provider; or 2) treatment by a health care provider on at
13 least one occasion which results in a regimen of continuing treatment under the supervision of the
14 health care provider. 29 C.F.R. § 825.114(a)(2)(i).

15 Pregnancy or prenatal care includes any period of incapacity due to the pregnancy or prenatal
16 care, such as time off from work for doctors' visits. 29 C.F.R. § 825.114(a)(2)(ii).

17 A chronic health condition means a condition which requires periodic visits for treatment by
18 a health care provider, or by a nurse or physician's assistant under direct supervision of a health care
19 provider, which continues over an extended period of time (including recurring episodes of a single
20 underlying condition), and may cause episodes of incapacity (inability to work, attend school or
21 perform other regular daily activities) rather than continuing incapacity. 29 C.F.R.
22 §825.114(a)(2)(iii).

23 Long-term incapacitating conditions are those for which treatment may not be effective, but
24 require continuing supervision of a health care provider, even though the patient may not be
25 receiving active treatment. 29 C.F.R. § 825.114(a)(2)(iv).

26 "Conditions requiring multiple treatments" includes any period of absence to receive multiple
27 treatments (including any period of recovery from the treatments) by a health care provider, or by
28 a provider of health care services under orders of, or on referral by, a health care provider, either for
29 restorative surgery after an accident or other injury, or for a condition that would likely result in a
30 period of incapacity (inability to work, attend school or perform other regular daily activities) of
31 more than three consecutive calendar days in the absence of medical intervention or treatment. 29
32 C.F.R. § 825.114(a)(2)(v).

33 The FMLA regulations provide some guidance concerning what is and is not a serious health
34 condition. For example, the following generally do not fall within the definition of a serious health
35 condition: routine physical, eye or dental examinations; treatments for acne or plastic surgery;
36 common ailments such as a cold or the flu, ear aches, upset stomach, minor ulcers, headaches (other
37 than migraines); and treatment for routine dental or orthodontic problems or periodontal disease. 29

1 C.F.R. § 114(b),(c). While the above conditions are not generally considered “serious,” the Third
2 Circuit has held that some conditions, such as upset stomach or a minor ulcer, could still be “serious
3 health conditions” if they meet the regulatory criteria, for example, an incapacity of more than three
4 consecutive calendar days that also involved qualifying treatment. *See generally Victorelli v.*
5 *Shadyside Hospital*, 128 F.3d 184, 190 (3d Cir. 1997) (jury question as to whether peptic ulcer was
6 a serious medical condition, noting that the FMLA is “intended to protect those who are occasionally
7 incapacitated by an on-going medical problem”).

8 In addition, the regulations provide guidance regarding what conditions commonly are
9 considered serious health conditions. For example, chronic conditions could include asthma,
10 diabetes or epilepsy; long-term incapacitating conditions could include Alzheimer’s, a severe stroke
11 or the terminal stages of a disease; and conditions requiring multiple treatments could include cancer
12 (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis). 29
13 C.F.R. § 825.114(a).

14 The regulations also provide that the phrase “continuing treatment” as used in the definition
15 of serious health condition, includes a course of prescription medication and therapy, but not over-
16 the-counter medications, bed-rest or exercise. 29 C.F.R. § 825.114(b).

17 18 *Certification of Medical Leave*

19 The FMLA does not require an employee, in the first instance, to provide a medical
20 certification justifying a leave for a serious health condition. But it does allow the employer to
21 demand such a certification. The rules on certification were described by the court in *Shtab v. Greate*
22 *Bay Hotel and Casino, Inc.*, 173 F. Supp.2d 255, 264 (D.N.J. 2001):

23 In order to safeguard the interests of employers and prevent abuses by employees,
24 Congress included a provision in the FMLA which entitled employers to request medical
25 certification from an employee requesting leave. 29 U.S.C. § 2613(a). When an employer
26 requests medical certification, it must provide the employee with notice of the consequences
27 of failing to provide the certification. 29 C.F.R. § 825.301(b)(1)(ii). A certification is
28 considered sufficient if it contains: (1) the date on which the serious health condition began;
29 (2) the probable duration of the condition; (3) the medical facts within the knowledge of the
30 health care provider regarding the condition; and (4) if the leave is for the purpose of caring
31 for a family member, an estimate of the amount of time that the employee will be needed to
32 care for the family member. 29 U.S.C. § 2613(b). "The employer shall advise an employee
33 whenever the employer finds a certification incomplete, and provide the employee a
34 reasonable opportunity to cure any such deficiency." 29 C.F.R. § 825.305(d); *Marrero v.*
35 *Camden County Board of Social Services*, 164 F. Supp. 2d 455, 466 (D.N.J.
36 2001)("termination is not an appropriate response for an inadequate certification. Section
37 825.305(d) provides that where an employer finds a certification incomplete, it must give the
38 employee a reasonable opportunity to cure any deficiencies").

1 The Act provides further protection for employers who doubt the veracity of an
2 employee's leave request. The employer may require, at its own expense, that the employee
3 obtain the opinion of a second health provider chosen or approved by the employer
4 concerning any of the information, i.e., the date of commencement, the probable duration,
5 or the medical facts, in the certification. 29 U.S.C. § 2613 (c); 29 C.F.R. § 825.307(a)(2).
6 If the second opinion does not assuage the employer's suspicions, then the employer may
7 require a third opinion which will be considered final. 29 U.S.C. § 2613 (d); 29 C.F.R. §
8 825.307(c). If the employee submits a complete certification signed by the health care
9 provider, a health care provider representing the employer may contact the employee's health
10 care provider, with the employee's permission, in order to clarify and authenticate the
11 certification. 29 C.F.R. § 825.307 (a)(1). (some citations omitted).

10.1.1 Elements of an FMLA Claim— Interference With Right to Take Leave

Model

[Plaintiff] claims that [defendant] interfered with [his/her] right to take unpaid leave from work under the Family and Medical Leave Act.

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [or a family member as defined by the Act] had a [specify condition].²

Second: This condition was a “serious health condition,” defined in the statute as an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital or other care facility, or 2) continuing treatment by a health care provider.³

Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work. “Appropriate notice” was given where,

[if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least 30 days before the leave was to begin]

[if [plaintiff] could not foresee the need for leave, [plaintiff] notified the defendant as soon as practicable after [he/she] learned of the need for leave].

[Plaintiff] was required to timely notify [defendant] of the need for leave, but [plaintiff] was not required to specify that the leave was sought under the Family and Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice.

Fourth: [Defendant] interfered with the exercise of [plaintiff’s] right to unpaid leave. Under the statute, “interference” can be found in a number of ways, including:

[Include any of the following factors raised by the evidence]

1) terminating employment;

² The Act also covers leave due to the birth of a son or daughter or the placement of a son or daughter with the employee for adoption or foster care. It is unlikely that these grounds would raise disputed questions of fact for the jury to decide, but if they do, the instruction can be altered accordingly.

³ If the court wishes to give a more detailed instruction on the term “serious health condition,” one is provided in 10.2.1.

1 2) refusing to allow an employee to return to his or her job, or to an equivalent
2 position, upon return from leave;⁴

3 3) ordering an employee not to take leave or discouraging an employee from taking
4 leave; and

5 4) failing to provide an employee who gives notice of the need for a leave a written
6 notice detailing the specific expectations and obligations of the employee and
7 explaining any consequences of a failure to meet these obligations.

8 [However, interference cannot be found simply because [defendant] imposes reporting
9 obligations for employees who are on leave. For example, an employer does not interfere with an
10 employee's right to take leave by establishing a policy requiring all employees to call in to report
11 their whereabouts while on leave. The Family and Medical Leave Act does not prevent employers
12 from ensuring that employees who are on leave do not abuse their leave.]

13
14 I instruct you that you do not need to find that [defendant] intentionally interfered with
15 [plaintiff's] right to unpaid leave. The question is not whether [defendant] acted with bad intent, but
16 rather whether [plaintiff] was entitled to a leave and [defendant] interfered with the exercise of that
17 leave.

18
19 **[Affirmative Defense:**

20 However, your verdict must be for [defendant] if [defendant] proves, by a preponderance of
21 the evidence, that [plaintiff] would have lost [his/her] job even if [he/she] had not taken leave. For
22 example, if [defendant] proves that [plaintiff]'s position was going to be eliminated even if [she/he]
23 would not have been on leave, then you must find for [defendant]].

24
25 **Comment**

26 29 U.S.C. § 2615(a)(1) provides that "[i]t shall be unlawful for any employer to interfere
27 with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the
28 FMLA]." Claims brought under § 2615(a)(1) are denominated "interference" claims. The court in
29 *Parker v. Hahnemann University Hospital*, 234 F. Supp.2d 478, 483 (D.N.J. 2002), provides helpful

⁴ If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

1 background on the gravamen of a claim brought under § 2615(a)(1), distinguishing it from a claim
2 for discrimination brought under § 2615(a)(2):

3 The first theory of recovery under the FMLA is the entitlement, or interference,
4 theory. It is based on the prescriptive sections of the FMLA which create substantive rights
5 for eligible employees. Eligible employees are entitled to up to twelve weeks of unpaid leave
6 per year because of a serious health condition, a need to care for a close family member with
7 a serious health condition, or a birth, adoption, or placement in foster care of a child. An
8 employee is also entitled to intermittent leave when medically necessary, 29 U.S.C. §
9 2612(b), and to return after a qualified absence to the same position or to an equivalent
10 position, 29 U.S.C. § 2614(a)(1). . . .

11 An employee can allege that an employer has violated the FMLA because she was
12 denied the entitlements due her under the Act. 29 U.S.C. § 2615(a)(1). In such a case, the
13 employee only needs to show she was entitled to benefits under the FMLA and that she was
14 denied them. She does not need to show that the employer treated other employees more or
15 less favorably and the employer cannot justify its action by showing that it did not intend it
16 or it had a legitimate business reason for it. The action is not about discrimination; it is about
17 whether the employer provided its employees the entitlements guaranteed by the FMLA.

18 *See also Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005) (no showing of
19 discrimination is required for an interference, as that claim is made if the employee shows “that he
20 was entitled to benefits under the FMLA and that he was denied them.”).

21 Because the issue in interference claims is not discrimination but interference with an
22 entitlement, courts have found that the plaintiff is not required to prove intentional misconduct. *See,*
23 *e.g., Williams v. Shenango, Inc.*, 986 F. Supp. 309, 317 (W.D.Pa. 1997) (finding that “a claim under
24 § 2615(a)(1) is governed by a strict liability standard”); *Moorer v. Baptist Memorial Health Care*,
25 398 F.3d 469, 487 (6th Cir. 2005) (“Because the issue [in an interference claim] is the right to an
26 entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of
27 the intent of the employer.”); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712 (7th Cir. 1997)
28 (noting that an employee alleging interference with an FMLA entitlement is not alleging
29 discrimination and therefore no intent to discriminate need be found).

30 31 *Affirmative Defense Where Employee Would Have Lost the Job Even if Leave Had Not Been Taken*

32 After taking a qualified leave, the employee is generally entitled to reinstatement in the same
33 or a substantially equivalent job. However, this is not the case if the employee would have lost her
34 job even if she had not taken leave. As the court put it in *Parker*, *supra*, “the FMLA does not give
35 the employee on protected leave a bumping right over employees not on leave.”

36 The *Parker* court considered which party had the burden of proof on whether the employee
37 would have lost her job even if she had not taken leave. The court noted that Department of Labor

1 regulations interpreting the FMLA place the burden of proof on the employer. 29 C.F.R. §
2 825.216(a)(1). The court continued its analysis as follows:

3 The Third Circuit has not considered whether this regulation places the burden on the
4 employer. The Tenth Circuit has held that it does and functions like an affirmative defense.
5 *Smith v. Diffie Ford-Lincoln-Mercury*, 298 F.3d 955, 963 (10th Cir. 2002). Under their
6 approach, the plaintiff presents her FMLA case by showing, as explained above, that she was
7 entitled to benefits and denied them. *Id.* Then, the burden is on the employer to mitigate its
8 liability by proving that she would have lost her job whether or not she took leave. *Id.* The
9 Seventh Circuit instead found that the regulation leaves the burden on the plaintiff to prove
10 that she was entitled to benefits and denied them even though the defendant presented some
11 evidence indicating that her job would have been terminated if she had not taken leave. *Rice*
12 *v. Sunrise Express*, 209 F.3d 1008, 1018 (7th Cir.2000). . . It interprets the regulation as only
13 requiring the defendant to come forward with some evidence that the termination would have
14 occurred without the leave.

15 This Court finds that the better approach is the one followed by the Tenth Circuit
16 which places the burden on the employer. An issue about the burden of proof is a "question
17 of policy and fairness based on experience in the different situations," *Keyes v. Sch. Dist. No.*
18 *1*, 413 U.S. 189, 209 (1973), and policy, fairness, and experience support the Tenth Circuit's
19 approach. As for policy, the approach upholds the validity and the plain language of the
20 regulation that was promulgated in accordance with standard administrative procedure. As
21 for fairness, the approach places the burden on the party who holds the evidence that is
22 essential to the inquiry, evidence about future plans for a position, discussions at
23 management meetings, and events at the workplace during the employee's FMLA leave. *See*
24 *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 359 n. 45 (1977) (stating that burdens
25 of proof should "conform with a party's superior access to the proof"). As for experience,
26 other labor statutes also place the burden on the employer to mitigate its liability to pay an
27 employment benefit in certain situations. As a result, this Court will require plaintiff to bear
28 the burden of proving that she was entitled to reinstatement and was denied it, and will
29 require defendants to mitigate their liability by bearing the burden of proving plaintiff's
30 position would have been eliminated even if she had not taken FMLA leave.

31 234 F. Supp.2d at 487 (footnotes and some citations omitted). Accordingly, the instruction places
32 the burden of proof on the defendant to show that the plaintiff would have lost her job even if she
33 had not taken leave. *See also Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 972 (8th Cir.
34 2005) (employer has the burden of showing that employee would have been discharged even if she
35 had not taken FMLA leave).

36
37 *The Meaning of "Interference"*

1 Courts have held that conduct discouraging employees from taking FMLA leave constitutes
2 interference, even if the employee ends up taking the leave. For example, in *Shtab v. The Greate Bay*
3 *Hotel and Casino*, 173 F. Supp.2d 255 (D.N.J. 2001), the court found that an employee could
4 establish an interference claim by proving that when he brought up the subject of FMLA leave, the
5 employer tried to persuade him to delay the leave because it was an especially busy period. The
6 plaintiff did not delay the leave, and the defendant argued that there was no ground of recovery for
7 interference because the plaintiff suffered no adverse employment action. But the court disagreed,
8 relying on 29 C.F.R. § 825.220 (b), which defines "interference" as including "not only refusing to
9 authorize FMLA leave, but discouraging an employee from using such leave." *See also Williams v.*
10 *Shenango, Inc.*, 986 F. Supp. 309, 320-21 (W.D. Pa. 1997) (employer's motion for summary
11 judgment denied where "reasonable persons could conclude that the initial denial of leave and the
12 suggestion of rescheduling leave may, in fact, constitute 'interference with' FMLA rights").

13 The FMLA does not, however, prohibit reasonable attempts by the employer to protect
14 against abuses in taking leave. Thus, in *Callison v. City of Philadelphia*, 430 F.3d 117, 121 (3d Cir.
15 2005), the employer imposed a requirement on all employees taking sick leave that they "notify the
16 appropriate authority or designee when leaving home and upon return" during working hours. The
17 plaintiff argued that the call-in requirement constituted interference with his FMLA leave, which he
18 interpreted as a right to be "left alone." But the court disagreed, stating that the FMLA does not
19 prevent employers "from ensuring that employees who are on leave from work do not abuse their
20 leave." Bracketed material in the instruction is consistent with the *Callison* decision.

21 22 *Notice Requirements*

23 Both the employee and the employer have notice obligations under the FMLA. These notice
24 obligations are described by the court in *Zawadowicz v. CVS Corp.*, 99 F. Supp.2d 518, 527 (D.N.J.
25 2000):

26
27 The FMLA and its regulations impose corresponding notice requirements on both
28 the employer and employee. The regulations require that covered employers post in
29 conspicuous places on its premises a notice explaining the FMLA's provisions and the
30 procedures for filing complaints of FMLA violations. 29 C.F.R. § 825.300(a). An employer
31 who fails to comply with the posting requirement is estopped from denying an employee
32 FMLA leave based on the employee's failure to supply advance notice of his need for leave.
33 29 C.F.R. § 825.300(b). The regulations further authorize a civil money penalty limited to
34 \$ 100 for each offense against an employer that willfully violates the posting requirement.
35 29 C.F.R. § 825.300(b).

36 In addition to the posting requirement, employers must include in all employment
37 handbooks or manuals information concerning employee entitlements and obligations under

1 the FMLA. 29 C.F.R. § 825.301(a)(1). Additionally, once an employee provides notice of
2 a need for FMLA leave, the employer has a duty to provide that employee with "written
3 notice detailing the specific expectations and obligations of the employee and explaining any
4 consequences of a failure to meet these obligations." 29 C.F.R. § 825.301(b)(1).

5 With regard to the notice obligations of employees, such obligations depend on
6 whether the employee's need for leave is foreseeable or unforeseeable. When the necessity
7 for leave is foreseeable based on planned medical treatment, the Act requires that the
8 employee:

9 (A) . . . make a reasonable effort to schedule the treatment so as not to disrupt unduly
10 the operations of the employer, subject to the approval of the health care provider of
11 the employee or [the employee's] [child], spouse, or parent . . . , as appropriate; and

12 (B) . . . provide the employer with [at least] 30 days' notice, before the date the leave
13 is to begin, of the employee's intention to take leave under such subparagraph, except
14 that if the date of the treatment requires leave to begin in less than 30 days, the
15 employee shall provide such notice as is practicable.

16 29 U.S.C. § 2612(e)(2). Where it is not possible for an employee to give thirty days notice,
17 the regulations define "as soon as practicable" as requiring "at least verbal notification to the
18 employer within one or two business days of when the need for leave becomes known to the
19 employee." 29 C.F.R. § 825.302(b).

20 Although the Act is silent as to an employee's notice requirements for unforeseeable
21 leave, the regulations address this issue, providing:

22 (a) When the approximate timing of the need for leave is not foreseeable, an
23 employee should give notice to the employer of the need for FMLA leave as soon as
24 practicable under the facts and circumstances of the particular case. It is expected that
25 an employee will give notice to the employer within no more than one or two
26 working days of learning of the need for leave, except in extraordinary circumstances
27 where such notice is not feasible. In the case of a medical emergency requiring leave
28 because of an employee's own serious health condition or to care for a family
29 member with a serious health condition, written advance notice pursuant to an
30 employer's internal rules and procedures may not be required when FMLA leave is
31 involved.

32 (b) The employee should provide notice to the employer either in person or by
33 telephone The employee need not expressly assert rights under the FMLA, but
34 may only state that leave is needed. The employer will be expected to obtain any
35 additional information through informal means. The employee . . . will be expected
36 to provide more information when it can readily be accomplished as a practical
37 matter, taking into consideration the exigencies of the situation.

1 The *Zawadowicz* Court concluded that the sufficiency of notice is generally a jury question.

2 In *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 90 (2002), the Court invalidated a
3 regulation promulgated by the Department of Labor which had provided that if the employer does
4 not give proper notice, the employee's leave could not be counted against the 12-week FMLA
5 period. In that case, the employee took a 30 week leave, and the employer had not given proper
6 notice that the leave would count against her FMLA entitlement. Under the terms of the regulation,
7 this meant that the employee would be entitled to 12 more weeks of leave after the 30 already taken.
8 The Court held that the regulation was beyond the Secretary of Labor's authority, because it was not
9 sufficiently tied to the interests protected by the FMLA:

10 The challenged regulation is invalid because it alters the FMLA's cause of action in a
11 fundamental way: It relieves employees of the burden of proving any real impairment of their
12 rights and resulting prejudice. ... [The regulation] transformed the company's failure to give
13 notice -- along with its refusal to grant her more than 30 weeks of leave -- into an actionable
14 violation of § 2615. This regulatory sleight of hand also entitled Ragsdale to reinstatement
15 and backpay, even though reinstatement could not be said to be "appropriate" in these
16 circumstances and Ragsdale lost no compensation "by reason of" Wolverine's failure to
17 designate her absence as FMLA leave. By mandating these results absent a showing of
18 consequential harm, the regulation worked an end run around important limitations of the
19 statute's remedial scheme.

20 The Third Circuit has emphasized that the Supreme Court, while invalidating the regulation
21 at issue in *Ragsdale*, did not question the validity of the regulations setting out the FMLA notice
22 requirements. *Conoshenti v. Public Service Electric & Gas Co.*, 364 F.3d 135, 143 (3d Cir. 2004).
23 The *Conoshenti* court noted that the regulations require "employers to provide employees with
24 individualized notice of their FMLA rights and obligations" by designating leave as FMLA-
25 qualifying, and giving notice of the designation to the employee. Moreover, each time the employee
26 requests leave, the employer must, within a reasonable time "provide the employee with written
27 notice detailing the specific expectations and obligations of the employee and explaining any
28 consequences of a failure to meet these obligations." (Quoting 29 C.F.R. § 825.301(b)(1), (c)). The
29 plaintiff in *Conoshenti* alleged that the employer's failure to give proper notice under the regulations
30 interfered with his ability to exercise his right to an FMLA leave. Specifically, had he received the
31 proper notice, he would have been able to make an informed decision about structuring his leave
32 and would have structured it, and his plan of recovery, in such a way as to preserve the job protection
33 afforded by the FMLA. The Third Circuit concluded that "this is a viable theory of recovery," and
34 in doing so addressed the defendant's argument that any reliance on the notice provisions in the
35 regulations was prohibited by *Ragsdale*. The court stated that the *Ragsdale* Court "expressly noted
36 that the validity of notice requirements of the regulations themselves was not before it. Accordingly,
37 *Ragsdale* is not dispositive of anything before us."

10.1.2 Elements of an FMLA Claim — Discrimination — Mixed-Motive

[Plaintiff] claims that [he/she] was discriminated against for exercising the right to unpaid leave under the Family and Medical Leave Act. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] taking leave was a motivating factor in [defendant's] decision [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: Plaintiff [or a family member as defined by the Act] had a [specify condition].⁵

Second: This condition was a “serious health condition,” defined in the statute as an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital or other care facility, or 2) continuing treatment by a health care provider.⁶

Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work. “Appropriate notice” was given where,

[if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least 30 days before the leave was to begin]

[if [plaintiff] could not foresee the need for leave, [plaintiff] notified the defendant as soon as practicable after [he/she] learned of the need for leave].

[Plaintiff] was required to timely notify [defendant] of the need for leave, but [plaintiff] was not required to specify that the leave was sought under the Family and Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice.

⁵ The Act also covers leave due to the birth of a son or daughter or the placement of a son or daughter with the employee for adoption or foster care. It is unlikely that these grounds would raise disputed questions of fact for the jury to decide, but if they do, the instruction can be altered accordingly.

⁶ If the court wishes to give a more detailed instruction on the term “serious health condition,” one is provided in 10.2.1.

1 Fourth: [Plaintiff] [was not reinstated in [his/her] job upon return from leave] [was not
2 placed in a substantially equivalent position upon [his/her] return from leave]⁷ [was
3 terminated after returning from leave] [was demoted after returning from leave].

4 Fifth: [Plaintiff's] taking leave was a motivating factor in [defendant's] decision [not to
5 reinstate, to terminate, etc.] [plaintiff].

6
7 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate,
8 [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate
9 [plaintiff's] federal rights.

10 In showing that [plaintiff's] taking leave was a motivating factor for [defendant's] action,
11 [plaintiff] is not required to prove that the leave was the sole motivation or even the primary
12 motivation for [defendant's] decision. [Plaintiff] need only prove that [his/her] taking leave played
13 a motivating part in [defendant's] decision even though other factors may also have motivated
14 [defendant].

15
16 **[For use where defendant sets forth a “same decision” affirmative defense:**

17 If you find in [plaintiff's] favor with respect to each of the facts that [plaintiff] must prove,
18 you must then decide whether [defendant] has shown that [defendant] would have made the same
19 decision with respect to [plaintiff's] employment even if there had been no motive to discriminate
20 on the basis of [plaintiff's] having taken leave. Your verdict must be for [defendant] if [defendant]
21 proves by a preponderance of the evidence that [defendant] would have treated [plaintiff] the same
22 even if [plaintiff's] leave had played no role in the employment decision.]

23
24
25 **Comment**

26 29 U.S.C. § 2615(a)(2) provides that “[i]t shall be unlawful for any employer to discharge
27 or in any other manner discriminate against any individual for opposing any practice made unlawful
28 by [the FMLA].” Discrimination claims brought under subsection (a)(2) are also called “retaliation”
29 claims, though they differ from the kind of retaliation claims ordinarily brought under the statutes

⁷ If there is a dispute on whether the plaintiff was restored to an equivalent position, the court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially equivalent position under the statute.

1 covering employment discrimination. Claims brought under subsection (a)(2) allege “retaliation” for
2 the exercise of the right to take unpaid leave under the FMLA. This is distinct from claims of
3 retaliation for actions such as complaining about discrimination, testifying in discrimination
4 proceedings, and the like, which are comparable to the retaliation claims brought under other
5 statutes, such as Title VII. In the Family and Medical Leave Act, those more “traditional” retaliation
6 claims are covered by 29 U.S.C. § 2615(b), which provides that it is unlawful to discriminate against
7 a person who has, e.g., “instituted or caused to be instituted any proceeding, . . . has given, or is
8 about to give, any information in connection with any inquiry or proceeding, . . . or has testified, or
9 is about to testify, in any inquiry or proceeding relating to any right provided under” the FMLA. A
10 separate instruction for these forms of retaliation, analogous to retaliation claims brought under other
11 employment discrimination statutes, is found at 10.1.4.

12 The court in *Bearley v. Friendly Ice Cream Corp.*, 322 F. Supp.2d 563, 571 (M.D.Pa. 2004),
13 describes the distinction between interference and discrimination/retaliation claims under the FMLA,
14 and the legal standards applicable to the latter claims, as follows:

15 Courts have recognized two distinct causes of action under the Family and Medical
16 Leave Act (hereinafter FMLA). First, a plaintiff may pursue recovery under an "interference"
17 theory. This claim arises under 29 U.S.C. § 2615(a)(1), which makes it unlawful for an
18 employer "to interfere with, restrain, or deny" an employee's rights under the FMLA. Under
19 an interference claim, it is plaintiff's burden to demonstrate that she was entitled to a benefit
20 under the FMLA, but was denied that entitlement. *Parker v. Hahnemann Univ. Hosp.*, 234
21 F. Supp. 2d 478, 485 (D. N.J. 2002). The FMLA entitles eligible employees to reinstatement
22 at the end of their FMLA leave to the position held before taking leave or an equivalent
23 position. If the plaintiff meets this burden, then it is defendant's burden to demonstrate that
24 she would have been denied reinstatement even if she had not taken FMLA leave.

25 The second type of recovery under the FMLA is the "retaliation" theory. This claim
26 arises under 29 U.S.C. § 2615(a)(2), which makes it unlawful for an employer to
27 discriminate against an employee who has taken FMLA leave. Retaliation claims are
28 analyzed under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411
29 U.S. 792. To establish a prima facie case of retaliation under the FMLA, a plaintiff must
30 show: (1) she engaged in a statutorily protected activity; (2) she suffered an adverse
31 employment action; and (3) a causal connection exists between the adverse action and
32 Plaintiff's exercise of her FMLA rights. After establishing a prima facie case, the burden
33 shifts to the employer to articulate a legitimate, nondiscriminatory reason for its adverse
34 employment action. If the employer offers a legitimate, nondiscriminatory reason, the burden
35 is shifted back to plaintiff to establish that the employer's reasons are pretextual. (Most
36 citations omitted).

37 *See also Callison v. City of Philadelphia*, 430 F.3d 117, 119 (3d Cir. 2005) (noting the distinction
38 between “interference” claims brought under subdivision (a)(1) and “discrimination or retaliation
39 claims” under subdivision (a)(2)).

1 Discrimination/retaliation claims are thus subject to the basic mixed-motive/pretext
2 delineation applied to employment discrimination claims brought under other statutes, e.g., Title VII,
3 Section 1981, and the ADEA. *See generally Wilson v. Lemington Home for the Aged*, 159 F. Supp.2d
4 186, 195 (W.D.Pa. 2001) (“In analyzing claims made for retaliation under the FMLA, courts look
5 to the legal framework established for Title VII claims. . . . Thus, a plaintiff may prove FMLA
6 retaliation by direct evidence as set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-46
7 (1989), or indirectly through the burden shifting analysis set forth by the Supreme Court in
8 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).”); *Baltuskonis v. U.S. Airways, Inc.*, 60
9 F. Supp. 2d 445, 448 (E.D. Pa. 1999) (same).

10 The distinction between “mixed-motive” cases and “pretext” cases is generally determined
11 by whether the plaintiff produces direct rather than circumstantial evidence of discrimination. If the
12 plaintiff produces direct evidence of discrimination, this is sufficient to show that the defendant’s
13 activity was motivated at least in part by discriminatory animus, and therefore this “mixed-motive”
14 instruction should be given. If the evidence of discrimination is only circumstantial, then defendant
15 can argue that there was no discriminatory animus at all, and that its employment decision can be
16 explained completely by a non-discriminatory motive; it is then for the plaintiff to show that the
17 alleged non-discriminatory motive is a pretext, and accordingly Instruction 10.1.3 should be given.
18 *See generally Fakete v. Aetna, Inc.*, 308 F.3d 335 (3d Cir. 2002) (using “direct evidence” to describe
19 “mixed-motive” cases and noting that pretext cases arise when the plaintiff presents only indirect
20 or circumstantial evidence of discrimination); *Conoshenti v. Public Service Electric & Gas Co.*, 364
21 F.3d 135, 147 (3d Cir. 2004) (relying on *Fakete* and applying the *Price Waterhouse* framework in
22 an FMLA discrimination case in which direct evidence of discrimination was presented).

23 The court in *Miller v. Cigna Corp.*, 47 F.3d 586, 597 (3d Cir. 1995) (en banc), an ADEA
24 case, distinguished “mixed motive” instructions from “pretext” case instructions as follows:

25 Only in a “mixed motives” . . . case is the plaintiff entitled to an instruction that he or she
26 need only show that the forbidden motive played a role, i.e., was a “motivating factor.” Even
27 then, the instruction must be followed by an explanation that the defendant may escape
28 liability by showing that the challenged action would have been taken in the absence of the
29 forbidden motive. . . . In all other . . . disparate treatment cases, the jury should be instructed
30 that the plaintiff may meet his or her burden only by showing that age played a role in the
31 employer’s decisionmaking process and that it had a determinative effect on the outcome of
32 that process.

33 *See also Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089, 1096, n4 (3d Cir. 1995)
34 (ADEA case):

35 An employment discrimination case may be advanced on either a pretext or “mixed-
36 motives” theory. In a pretext case, once the employee has made a prima facie showing of
37 discrimination, the burden of going forward shifts to the employer who must articulate a
38 legitimate, nondiscriminatory reason for the adverse employment decision. If the employer
39 does produce evidence showing a legitimate, nondiscriminatory reason for the discharge, the

1 burden of production shifts back to the employee who must show that the employer's
2 proffered explanation is incredible. At all times the burden of proof or risk of non-
3 persuasion, including the burden of proving "but for" causation or causation in fact, remains
4 on the employee. In a "mixed-motives" or *Price Waterhouse* case, the employee must
5 produce direct evidence of discrimination, i.e., more direct evidence than is required for the
6 *McDonnell Douglas/Burdine* prima facie case. If the employee does produce direct evidence
7 of discriminatory animus, the employer must then produce evidence sufficient to show that
8 it would have made the same decision if illegal bias had played no role in the employment
9 decision. In short, direct proof of discriminatory animus leaves the employer only an
10 affirmative defense on the question of "but for" cause or cause in fact. (Citations omitted).
11

12 *"Same Decision" Affirmative Defense*

13 Section 107 of the Civil Rights Act of 1991 (42 U.S.C. §2000e-(5)(g)(2)(B)) changed the law
14 on "mixed-motive" liability in Title VII actions. Previously, a defendant could escape liability by
15 proving the "same decision" would have been made even without a discriminatory motive. The Civil
16 Rights Act of 1991 provides that a "same decision" defense precludes an award for money damages,
17 but not liability.

18 There is no indication in the FMLA of an intent to incorporate the "same decision" revision
19 of the Civil Rights Act of 1991. The 1991 amendments apply specifically to actions brought under
20 Title VII, and Title VII does not prohibit discrimination for taking unpaid leave. Accordingly, the
21 pattern instruction sets forth the "same decision" defense as one that precludes liability, and thus
22 differentiates it from the "same decision" defense in Title VII mixed-motive actions. See Comment
23 to Eighth Circuit Pattern Jury Instruction 5.82 ("Until there is case law to the contrary, it is the
24 Committee's position that a defendant may avoid liability in an FMLA case if it convinces a jury that
25 the plaintiff would have suffered the same adverse employment action even if he or she had not taken
26 or requested FMLA leave.").

27 28 *Notice Requirements*

29 For a discussion of notice requirements pertinent to FMLA claims, see the commentary to
30 Instruction 10.1.1.

31 *Serious Health Condition*

32 For a discussion of the term "serious health condition" see the commentary to Instruction
33 10.0.
34

10.1.3 Elements of an FMLA Claim— Discrimination —Pretext

Model

In this case [plaintiff] is alleging that [he/she] was discriminated against for exercising the right to unpaid leave under the Family and Medical Leave Act. In order for [plaintiff] to recover on this discrimination claim against [defendant], [plaintiff] must prove that [defendant] intentionally discriminated against [plaintiff]. This means that [plaintiff] must prove that [his/her] exercise of the right to take leave was a determinative factor in [defendant's] decision to [describe action] [plaintiff].

To prevail on this claim, [plaintiff] must prove all of the following by a preponderance of the evidence:

First: [Plaintiff] [or a family member as defined by the Act] had a [specify condition].⁸

Second: This condition was a “serious health condition”, defined in the statute as an illness, injury, impairment or physical or mental condition that involves either 1) inpatient care in a hospital or other care facility, or 2) continuing treatment by a health care provider.⁹

Third: [Plaintiff] gave appropriate notice of [his/her] need to be absent from work. “Appropriate notice” was given where,

[if [plaintiff] could foresee the need for leave, [he/she] notified [defendant] at least 30 days before the leave was to begin]

[if [plaintiff] could not foresee the need for leave, [plaintiff] notified the defendant as soon as practicable after [he/she] learned of the need for leave].

[Plaintiff] was required to timely notify [defendant] of the need for leave, but [plaintiff] was not required to specify that the leave was sought under the Family and Medical Leave Act, nor was [plaintiff] required to mention that Act in the notice.

⁸ The Act also covers leave due to the birth of a son or daughter or the placement of a son or daughter with the employee for adoption or foster care. It is unlikely that these grounds would raise disputed questions of fact for the jury to decide, but if they do, the instruction can be altered accordingly.

⁹ If the court wishes to give a more detailed instruction on the term “serious health condition,” one is provided in 10.2.1.

1 Fourth: [Plaintiff] [was not reinstated in [his/her] job upon return from leave] [was not
2 placed in a substantially equivalent position upon [his/her] return from leave]¹⁰ [was
3 terminated after returning from leave] [was demoted after returning from leave].

4 Fifth: [Plaintiff's] taking leave was a determinative factor in [defendant's] decision to
5 [describe adverse employment action].

6
7 Although [plaintiff] must prove that [defendant] acted with the intent to discriminate,
8 [plaintiff] is not required to prove that [defendant] acted with the particular intent to violate
9 [plaintiff's] federal civil rights. Moreover, [plaintiff] is not required to produce direct evidence of
10 intent, such as statements admitting discrimination. Intentional discrimination may be inferred from
11 the existence of other facts.

12 [For example, you have been shown statistics in this case. Statistics are one form of evidence
13 from which you may find, but are not required to find, that a defendant intentionally discriminated
14 against a plaintiff. You should evaluate statistical evidence along with all the other evidence received
15 in the case in deciding whether [defendant] intentionally discriminated against [plaintiff]].

16 [Defendant] has given a nondiscriminatory reason for its [describe defendant's action]. If
17 you disbelieve [defendant's] explanations for its conduct, then you may, but need not, find that
18 [plaintiff] has proved intentional discrimination. In determining whether [defendant's] stated reason
19 for its actions was a pretext, or excuse, for discrimination, you may not question [defendant's]
20 business judgment. You cannot find intentional discrimination simply because you disagree with the
21 business judgment of [defendant] or believe it is harsh or unreasonable. You are not to consider
22 [defendant's] wisdom. However, you may consider whether [defendant's] reason is merely a cover-up
23 for discrimination.

24 Ultimately, you must decide whether [plaintiff] has proven that [his/her] taking leave under
25 the Family Medical Leave Act was a determinative factor in [defendant's employment decision.]
26 "Determinative factor" means that if not for [plaintiff's] taking leave, the [adverse employment
27 action] would not have occurred.

28
29
30

¹⁰ If there is a dispute on whether the plaintiff was restored to an equivalent position, the
court may wish to use Instruction 10.2.2 to instruct the jury more fully on what is a substantially
equivalent position under the statute.

Comment

This instruction is to be used when the plaintiff's proof of discrimination is circumstantial rather than direct. In *Miller v. Cigna Corp.*, 47 F.3d 586, 597 (3d Cir. 1995) (en banc), an ADEA case, the court discussed the proper instruction to be given in a circumstantial evidence/pretext case:

A plaintiff . . . who does not qualify for a burden shifting instruction under *Price Waterhouse* [i.e., a "mixed-motive" case] has the burden of persuading the trier of fact by a preponderance of the evidence that there is a "but-for" causal connection between the plaintiff's age and the employer's adverse action -- i.e., that age "actually played a role in [the employer's decisionmaking] process and had a determinative influence on the outcome" of that process. (Quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993)).

The Court in *Miller* reversed a verdict for the defendant because the trial judge instructed the jury that age must be the "sole cause" of the employer's decision. That standard was too stringent; instead, in a pretext case, "plaintiff must prove by a preponderance of the evidence that age played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process." See *Alifano v. Merck & Co., Inc.*, 175 F. Supp.2d 792, 794 (E.D.Pa. 2001) (applying the *McDonnell-Douglas* analysis to an FMLA claim).

When articulating a legitimate, nondiscriminatory reason for its action, the defendant is required to introduce evidence that creates a question of fact as to whether the proffered reason or discriminatory animus was the determinative factor. See *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 (1993). If the defendant meets its burden of producing evidence of a nondiscriminatory reason for its action, the plaintiff must persuade the jury that the defendant's stated reason was merely a pretext for discrimination, or in some other way prove it more likely than not that discrimination motivated the employer. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The plaintiff retains the ultimate burden of proving intentional discrimination. *Chipolini v. Spencer Gifts, Inc.*, 814 F.2d 893, 897 (3d Cir. 1987) (en banc) (ADEA case) ("The burden remains with the plaintiff to prove that age was a determinative factor in the defendant employer's decision. The plaintiff need not prove that age was the employer's sole or exclusive consideration, but must prove that age made a difference in the decision."). The factfinder's rejection of the employer's proffered reason allows, but does not compel, judgment for the plaintiff. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."). The employer's proffered reason can be shown to be pretextual by circumstantial as well as direct evidence. *Chipolini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir. 1987) (en banc). "To discredit the employer's proffered reason . . . the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent or competent." *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1109 (3d Cir. 1997).

1 *Notice Requirements*

2 For a discussion of notice requirements under the FMLA, see the commentary to Instruction
3 10.1.1.

4 *Serious Health Condition*

5 For a discussion of the term “serious health condition” see the commentary to Instruction
6 10.0.

7

10.1.4 Elements of an FMLA Claim — Retaliation for Opposing Actions in Violation of FMLA

Model

[Plaintiff] claims that [defendant] discriminated against [him/her] because [plaintiff] opposed a practice made unlawful by the Family and Medical Leave Act.

In order to prevail on this claim, [plaintiff] must prove all of the following elements by a preponderance of the evidence:

First: [Plaintiff] [filed a complaint] [instituted a proceeding] [made an informal complaint to her employer¹¹] [testified/agreed to testify in a proceeding] asserting rights under the Family and Medical Leave Act.

Second: [Plaintiff] was subjected to a materially adverse action at the time, or after, the protected conduct took place.

Third: There was a causal connection between [describe challenged activity] and [plaintiff's] [describe plaintiff's protected activity].

Concerning the first element, [plaintiff] need not prove the merits of any Family and Medical Leave Act claim, but only that [he/she] was acting under a good faith belief that [his/her] [or someone else's] rights under the Family and Medical Leave Act were violated.

Concerning the second element, the term “materially adverse” means that [plaintiff] must show [describe alleged retaliatory activity] was serious enough that it well might have discouraged a reasonable worker from [describe plaintiff's protected activity]. [The activity need not be related to the workplace or to [plaintiff's] employment.]

Concerning the third element, that of causal connection, that connection may be shown in many ways. For example, you may or may not find that there is a sufficient connection through timing, that is [defendant's] action followed shortly after [defendant] became aware of [plaintiff's] [describe activity]. Causation is, however, not necessarily ruled out by a more extended passage of time. Causation may or may not be proved by antagonism shown toward [plaintiff] or a change in demeanor toward [plaintiff].

Ultimately, you must decide whether [plaintiff's] [protected activity] had a determinative effect on [describe alleged retaliatory activity]. “Determinative effect” means that if not for [plaintiff's] [protected activity], [describe alleged retaliatory activity] would not have occurred.

¹¹ See the Comment to this instruction for a discussion of whether informal complaints are protected activity under the Family and Medical Leave Act.

Comment

The FMLA establishes a cause of action for retaliation that is similar to those provided in other employment discrimination statutes. 29 U.S.C. § 2615(b) provides as follows:

(b) *Interference with proceedings or inquiries.* It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--

has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to [the FMLA];

has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under [the FMLA]; or

has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under [the FMLA].

Subsection (b) provides a cause of action that is separate from 29 U.S.C. § 2615 (a)(2), which is also referred to as a “retaliation” claim, but is different because it seeks recovery for the plaintiff’s having exercised the right to unpaid leave. In contrast, the more traditional retaliation claim of subsection (b) is designed to protect those who complain about conduct that is illegal under the FMLA, or who participate in proceedings seeking recovery for illegal activity under the Act. Potentially subsection (b) could protect a person who is not entitled to or never exercised the right to leave, but who complained about or participated in a proceeding to remedy the violation of the FMLA rights of another person. That is not the case with claims under subsection (a)(2), where recovery is limited to those who actually took or tried to take unpaid leave. See Instructions 10.1.2 and 10.1.3 for claims brought under 29 U.S.C. § 2615(a)(2).

The sparse case law under 29 U.S.C. § 2615(b) indicates that it is to be applied in the same way that other employment discrimination statutes treat retaliation claims. *See, e.g., Buie v. Quad/Graphics*, 366 F.3d 496, 503 (7th Cir. 2004) (“We evaluate a claim of FMLA retaliation the same way that we would evaluate a claim of retaliation under other employment statutes, such as the ADA or Title VII.”).

Protected Activity

The literal terms of 29 U.S.C. § 2615(b) would appear to limit protected conduct to that involved in a formal proceeding — in contrast to the retaliation provisions of other acts (such as Title VII and the ADEA) which protect informal activity in opposition to prohibited practices under the respective statutes, including informal complaints to an employer.

The Third Circuit has not yet decided whether there is a cause of action for retaliation under

1 29 U.S.C. § 2615(b) when an employee has informally opposed an employer's action on the ground
2 that it violates the FMLA. But case law construing similar language in the retaliation provision of
3 the Equal Pay Act indicates that such a provision should be construed broadly so that informal
4 complaints constitute protected activity. See the commentary to Instruction 11.1.2. This instruction
5 therefore includes informal complaints as protected activity. See *Sabbrese v. Lowe's Home Centers,*
6 *Inc.*, 320 F. Supp.2d 311, 324 (W.D.Pa. 2004) (finding a valid retaliation claim when the plaintiff
7 was discharged after informally complaining to the employer about being disciplined for taking
8 leave).

9
10 *Standard for Actionable Retaliation*

11 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 126 S.Ct. 2405, 2415 (2006), held
12 that a cause of action for retaliation under Title VII lies whenever the employer responds to protected
13 activity in such a way "that a reasonable employee would have found the challenged action
14 materially adverse, which in this context means it well might have dissuaded a reasonable worker
15 from making or supporting a charge of discrimination." (citations omitted). The Court elaborated on
16 this standard in the following passage:

17 We speak of *material* adversity because we believe it is important to separate
18 significant from trivial harms. Title VII, we have said, does not set forth "a general civility
19 code for the American workplace." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S.
20 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). An employee's decision to report
21 discriminatory behavior cannot immunize that employee from those petty slights or minor
22 annoyances that often take place at work and that all employees experience. See 1 B.
23 Lindemann & P. Grossman, *Employment Discrimination Law* 669 (3d ed. 1996) (noting that
24 "courts have held that personality conflicts at work that generate antipathy" and "'snubbing'
25 by supervisors and co-workers" are not actionable under § 704(a)). The anti-retaliation
26 provision seeks to prevent employer interference with "unfettered access" to Title VII's
27 remedial mechanisms. It does so by prohibiting employer actions that are likely "to deter
28 victims of discrimination from complaining to the EEOC," the courts, and their employers.
29 And normally petty slights, minor annoyances, and simple lack of good manners will not
30 create such deterrence. See 2 EEOC 1998 Manual § 8, p. 8-13.

31 We refer to reactions of a *reasonable* employee because we believe that the
32 provision's standard for judging harm must be objective. An objective standard is judicially
33 administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial
34 effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need
35 for objective standards in other Title VII contexts, and those same concerns animate our
36 decision here. See, e.g., [Pennsylvania State Police v.] *Suders*, 542 U.S., at 141, 124 S. Ct.
37 2342, 159 L. Ed. 2d 204 (constructive discharge doctrine); *Harris v. Forklift Systems, Inc.*,
38 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (hostile work environment
39 doctrine).

1 We phrase the standard in general terms because the significance of any given act
2 of retaliation will often depend upon the particular circumstances. Context matters. . . . A
3 schedule change in an employee's work schedule may make little difference to many workers,
4 but may matter enormously to a young mother with school age children. A supervisor's
5 refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But
6 to retaliate by excluding an employee from a weekly training lunch that contributes
7 significantly to the employee's professional advancement might well deter a reasonable
8 employee from complaining about discrimination. Hence, a legal standard that speaks in
9 general terms rather than specific prohibited acts is preferable, for an act that would be
10 immaterial in some situations is material in others.

11 Finally, we note that . . . the standard is tied to the challenged retaliatory act, not the
12 underlying conduct that forms the basis of the Title VII complaint. By focusing on the
13 materiality of the challenged action and the perspective of a reasonable person in the
14 plaintiff's position, we believe this standard will screen out trivial conduct while effectively
15 capturing those acts that are likely to dissuade employees from complaining or assisting in
16 complaints about discrimination.

17 126 S.Ct. at 2415 (some citations omitted).

18 The anti-retaliation provision of Title VII, construed by the Court in *White*, is substantively
19 identical to the FMLA provision on retaliation, *supra*. This instruction therefore follows the
20 guidelines of the Supreme Court's decision in *White*.

21
22
23 *No Requirement That Retaliation Be Job-Related To Be Actionable*
24

25 The Supreme Court in *Burlington N. & S.F. Ry. v. White*, 126 S.Ct. 2405, 2413 (2006), held
26 that retaliation need not be job-related to be actionable under Title VII. In doing so, the Court
27 rejected authority from the Third Circuit (and others) requiring that the plaintiff suffer an adverse
28 employment action in order to recover for retaliation. The Court distinguished Title VII's retaliation
29 provision from its basic anti-discrimination provision, which does require an adverse employment
30 action. The Court noted that unlike the basic anti-discrimination provision, which refers to
31 conditions of employment, the anti-retaliation provision is broadly worded to prohibit *any*
32 discrimination by an employer in response to protected activity.

33 Because the FMLA anti-retaliation provision is substantively identical to the Title VII
34 provision construed in *White* — it prohibits not only “discharge” but broadly prohibits “any other
35 discrimination” — this instruction contains bracketed material to cover a plaintiff's claim for
36 retaliation that is not job-related. The instruction does not follow pre-*White* Third Circuit authority

1 which required the plaintiff in a retaliation claim to prove that she suffered an adverse employment
2 action. *See, e.g., Nelson v. Upsala College*, 51 F.3d 383, 386 (3d Cir.1995)(requiring the plaintiff
3 in a retaliation case to prove among other things that “the employer took an adverse employment
4 action against her”).

5 It should be noted, however, that damages for emotional distress and pain and suffering are
6 not recoverable under the FMLA. *Lloyd v. Wyoming Valley Health Care Sys.*, 994 F. Supp. 288, 291
7 (M.D. Pa. 1998) . So, to the extent that retaliatory activity is not job-related, it is probably less likely
8 to be compensable under the ADEA than it is under Title VII, For further discussion of *White*, see
9 the Comment to Instruction 5.1.7.

12 *Determinative Effect*

13 The Third Circuit has held that for a retaliation claim in an employment discrimination case,
14 the court must instruct the jury that the plaintiff’s protected activity must have had a “determinative
15 effect” on the employer’s decision. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 935 (1997) (holding
16 that the “mixed-motive” amendments to the Civil Rights Act of 1991 do not apply to retaliation
17 claims, and therefore that “the district court abused its discretion in failing to instruct the jury that
18 improper motive must have had a determinative effect on the decision to fire Woodson.”) The
19 pattern instruction accordingly includes a “determinative effect” instruction.

21 *Timing*

22 On the relationship between timing and retaliation in FMLA cases, *see, e.g., Sabbrese v.*
23 *Lowe’s Home Centers, Inc.*, 320 F. Supp.2d 311, 324 (W.D.Pa. 2004) (“The court finds that plaintiff
24 met the causal link requirement of his prima facie case by presenting evidence that: (1) he was
25 terminated two weeks after he complained to store management; (2) defendant's management
26 officials gave inconsistent explanations about who authorized his firing; and (3) plaintiff was
27 permitted to continue working after allegedly committing a violation so severe that he could have
28 been immediately terminated.”).

10.2.1 FMLA Definitions — Serious Health Condition

Model

The phrase "serious health condition," as used in these instructions, means an illness, injury, impairment, or physical or mental condition that involves:

Set forth any of the following that are presented by the evidence:

[Inpatient care (for example, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities), or any later treatment in connection with the inpatient care];

OR

[Incapacity plus treatment, which means a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive days, including any later treatment or period of incapacity relating to the same condition, that also involves:

1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health services (for example, a physical therapist) under orders of, or on referral by, a health care provider; or

2) Treatment by a health care provider on at least one occasion which results in a program of continuing treatment under the supervision of the health care provider];

OR

[Any period of incapacity (inability to work, attend school or perform other regular daily activities) due to pregnancy or for prenatal care];

OR

[A chronic health condition, which means a condition that requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider, which continues over an extended period of time (including recurring episodes of a single condition), and may cause incapacity from time to time (inability to work, attend school or perform other regular daily activities) rather than continuing incapacity];

OR

[A period of incapacity (inability to work, attend school or perform other regular daily activities) which is permanent or long-term due to a condition for which treatment may not be

effective, but requires continuing supervision of a health care provider, even though [plaintiff] may not be receiving active treatment];

OR

[Any period of absence to receive multiple treatments (including any period of recovery from the treatments) by a health care provider, or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity (inability to work, attend school or perform other regular daily activities) of more than three consecutive calendar days in the absence of medical intervention or treatment.]

Comment

This instruction can be used if the court wishes to provide the jury with more detailed information on what constitutes a serious health condition than that set forth in Instructions 10.1.1-10.1.3. This instruction is substantively identical to the detailed Department of Labor regulation defining a serious health condition under the FMLA. 29 C.F.R. § 825.114. If the court wishes to use this instruction, it should of course use the bracketed option that corresponds to the facts of the case. Within each optional definition, the language may need to be adjusted to different facts.

The definitions section of the FMLA (29 U.S.C. §2611(6)) defines “health care provider” as follows:

6) *Health care provider*. The term "health care provider" means--

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(B) any other person determined by the Secretary to be capable of providing health care services.

The regulations promulgated by the Department of Labor defined additional persons "capable of providing health care services" to include the workers described in this Instruction as well as 1) chiropractors, if treatment is limited to "manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist;" 2) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts; 3) any health care provider from whom an employer or the employer’s group health plan’s benefits manager will accept certification of the existence of

1 a serious health condition to substantiate a claim for benefits; and 4) a health care provider who falls
2 within one of the specifically mentioned categories who practices in a country other than the United
3 States, so long as he or she is authorized to practice in accordance with the law of that country and
4 is performing within the scope of his or her practice. The regulations state that "authorized to practice
5 in the State" means that the health care provider must be authorized to diagnose and treat physical
6 or mental health conditions without supervision by a doctor or other health care provider. 29 C.F.R.
7 § 825.118.

8 For case law in the Third Circuit construing the term "serious health condition", *see, e.g.*,
9 *Victorelli v. Shadyside Hospital*, 128 F.3d 184, 190 (3d Cir. 1997) ("A factfinder may be able
10 reasonably to find that Victorelli suffers from something more severe than a 'minor ulcer' and as
11 such is entitled to FMLA protection."); *Marrero v. Camden County Board of Social Services*, 164
12 F. Supp.2d 455, 465 (D.N.J. 2001) (concluding that "there is nothing in the statute or regulations that
13 prevents plaintiff's anxiety and depression from qualifying as a serious condition under the Act.
14 Indeed, the regulations expressly recognize the seriousness of mental illness under certain
15 circumstances.").

10.2.2 FMLA Definitions — Equivalent Position

Model

[Defendant] claims that after returning from leave, [plaintiff] was placed in a position that was equivalent to the one that [he/she] had before taking leave. [Plaintiff] claims that the new position was not equivalent to the old one. Under the Family and Medical Leave Act, the new position is equivalent to the old one if it is substantially identical in terms of pay, benefits and working conditions, including privileges, “perks” and status. It must involve the same or substantially similar duties or responsibilities, and require substantially equivalent skill, effort, responsibility, and authority. [Plaintiff] must prove by a preponderance of the evidence that the new position was not equivalent to the old one.

Comment

The court may wish to use this instruction if there is a dispute on whether the plaintiff was restored to an equivalent position. The instruction tracks the language of the FMLA regulations at 29 C.F.R. § 825.215(a). For an application of the “equivalent position” test, *see Oby v. Baton Rouge Marriott*, 329 F. Supp.2d 772, 781 (M.D. La. 2004), where the plaintiff, who was employed as the executive in charge of housekeeping at a hotel, was offered the position of executive in charge of food and beverages upon return from FMLA leave. The court noted that courts have interpreted the “equivalent position” standard narrowly; but it concluded that these two positions were equivalent because the salary and benefits were the same, and both positions “involved supervisory duties and both had the same goal and responsibility -- customer service in and maintenance of the Baton Rouge Marriott in a managerial capacity.”

10.3.1 FMLA Defense — Key Employee

Model

If you find that [plaintiff] has proved by a preponderance of the evidence that [he/she] was not restored to [his/her] position [or to an equivalent position] after returning from a leave authorized by the Family and Medical Leave Act, you must then consider [defendant's] defense. The Family and Medical Leave Act permits an employer to deny job restoration to a "key employee" when necessary to protect the employer from substantial and grievous economic injury. [Defendant] contends that it had no obligation to restore [plaintiff] to a position because [plaintiff] was a "key employee" and that [describe defendant's action] was necessary to protect [defendant] from substantial and grievous economic injury.

Your verdict must be for [defendant] if [defendant] proves all of the following by a preponderance of the evidence:

First: That [plaintiff] was a "key employee." [Plaintiff] was a "key employee" within the meaning of the Act if [he/she] was a salaried employee who was among the highest paid 10 percent of all the employees employed by [defendant] within 75 miles of [plaintiff's] worksite. The determination of whether [plaintiff] was among the highest paid 10 percent is to be made as of the time [plaintiff] gave notice of the need for leave.

Second: That failing to restore [plaintiff] to [his/her] former job [or an equivalent position] was necessary to prevent substantial and grievous economic injury to the operations of [defendant]. In determining whether or not [defendant's] action was economically justified in this sense, you may consider factors such as whether [plaintiff] was so important to the business that [defendant] could not temporarily do without [plaintiff] and could not replace [plaintiff] on a temporary basis. You may also consider whether the cost of reinstating [plaintiff] after a leave would be substantial.

Third: That [defendant], when it determined that substantial and grievous injury would occur from [plaintiff's] leave, promptly notified [plaintiff] of its intent to deny restoration of [plaintiff's] job, specifying in the notice [defendant's] contention that [plaintiff] was a "key employee" and restoration of [his/her] job after a leave would cause substantial and grievous economic injury to [defendant].

Comment

An employer may deny job restoration to a "key employee" if the denial is necessary to prevent substantial and grievous economic injury to the operations of the employer. 29 U.S.C. §

2614(b) provides as follows:

(b) *Exemption concerning certain highly compensated employees.*

(1) *Denial of restoration.* An employer may deny restoration . . . if--

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) *Affected employees.* An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

The phrase “substantial and grievous economic injury” covers actions that threaten the economic viability of the employer or lesser injuries that cause substantial long-term economic injury. But minor inconveniences and costs that the employer would experience in the normal course of doing business do not constitute “substantial and grievous economic injury.” 29 C.F.R. § 825.218(c).

For a case applying the term “key employee,” *see Oby v. Baton Rouge Marriott*, 329 F. Supp.2d 772, 783 (M.D. La. 2004), where the court granted summary judgment to the employer because the plaintiff was a key employee and the employer had followed the requirements set out in the regulations:

To deny restoration to a key employee, an employer must determine that restoring the employee to employment will cause substantial and grievous economic injury to the operations of the employer The regulations do not provide a precise test for the level of hardship or injury to the employer which must be sustained to constitute a substantial and grievous injury. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.

Plaintiff has not presented any evidence to rebut . . . Columbia Sussex's evidence that it would have suffered substantial and grievous economic injury had it reinstated plaintiff to the position of Executive Housekeeper. In fact, the undisputed evidence shows that plaintiff was relied upon as the Executive Housekeeper at the Baton Rouge Marriott to keep the facilities clean and Columbia Sussex's customers happy. In consideration of this reliance, plaintiff was the third highest paid employee at the facility. When plaintiff left, the facility was suffering, and an educated business decision was made to replace plaintiff . . . Defendant

1 had also determined that reinstating plaintiff would cause it substantial and grievous
2 economic injury if it had to pay two Executive Housekeepers \$41,000 each.

10.4.1 FMLA Damages — Back Pay — Non-Willful Violation

Model

If you find that [defendant] has violated [plaintiff's] rights under the Family and Medical Leave Act, then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You must award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff's] rights not been violated.

You must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [two years before the date the lawsuit was filed] through the date of your verdict.

You must reduce any award of damages for lost wages and benefits by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award damages for lost wages, you are instructed to deduct from this figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits from an award of lost wages.

[You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her] damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant] persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had obtained those opportunities.]

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

[Add the following instruction if the employer claims “after-acquired evidence” of misconduct by the plaintiff:

[Defendant] contends that it would have made the same decision to [describe employment decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment decision. Specifically, [defendant] claims that when it became aware of the [describe the after-discovered misconduct], [defendant] would have made the decision at that point had it not been

made previously.

If [defendant] proves by a preponderance of the evidence that it would have made the same decision and would have [describe employment decision] [plaintiff] because of [describe after-discovered evidence], you must limit any award of lost wages to the date [defendant] would have made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired information.]

Comment

The statute of limitations for recovery under the FMLA is two years, but it is extended to three years if the employer's violation was willful. 26 U.S.C. § 2617(c)(2). The standard for "willfulness" is the same as that applied to the liquidated damages provision in the ADEA, and the statute of limitations provision in the Equal Pay Act, i.e., whether the employer "either knew or showed reckless disregard" for the employee's statutory rights. *See Hoffman v. Professional Med Team*, 394 F.3d 414, 417 (6th Cir. 2005) ("the standard for willfulness under the FMLA extended statute of limitations is whether the employer intentionally or recklessly violated the FMLA."). This instruction is to be used when the plaintiff does not present evidence sufficient to create a jury question on whether the defendant acted willfully. See 10.4.2 for an instruction covering a willful violation of the FMLA.

29 U.S.C. § 2617(a) provides the following damages for an employee against an employer who violates the FMLA:

Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible employee affected for damages equal to--

(i) the amount of--

(I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or

(II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;

(ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and
(iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer . . . proves to the satisfaction of the court that the act or omission which violated [the FMLA] was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of [the FMLA], such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively;

1 Section 2617(a) authorizes the court to award “such equitable relief as may be appropriate,
2 including employment, reinstatement, and promotion.”

3 In accordance with 29 U.S.C. § 2617(a), the court must double the amount of back pay
4 damages as liquidated damages, unless the defendant persuades the court that the violation was in
5 good faith and that the employer had reasonable grounds for believing that the act or omission was
6 not a violation of the FMLA— in which case the court has the discretion to limit the award to the
7 amount of damages found by the jury.

8
9 *Attorney Fees and Costs*

10 There appears to be no uniform practice regarding the use of an instruction that warns the
11 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652
12 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if plaintiff
13 wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you
14 award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how
15 much. Therefore, attorney fees and costs should play no part in your calculation of any damages.”
16 *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the
17 instruction, and, reviewing for plain error, found none: “We need not and do not decide now whether
18 a district court commits error by informing a jury about the availability of attorney fees in an ADEA
19 case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons.” *Id.* at 657.
20 First, “it is not ‘obvious’ or ‘plain’ that an instruction directing the jury *not* to consider attorney fees”
21 is irrelevant or prejudicial; “it is at least arguable that a jury tasked with computing damages might,
22 absent information that the Court has discretion to award attorney fees at a later stage, seek to
23 compensate a sympathetic plaintiff for the expense of litigation.” *Id.* Second, it is implausible “that
24 the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the
25 disproportionate step of returning a verdict against him even though it believed he was the victim
26 of age discrimination, notwithstanding the District Court’s clear instructions to the contrary.” *Id.*;
27 *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and
28 *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

10.4.2 FMLA Damages — Back Pay– Willful Violation

Model

If you find that [defendant] has violated [plaintiff's] rights under the Family and Medical Leave Act, then you must determine the amount of damages that [defendant's] actions have caused [plaintiff]. [Plaintiff] has the burden of proving damages by a preponderance of the evidence.

You must award as actual damages an amount that reasonably compensates [plaintiff] for any lost wages and benefits, taking into consideration any increases in salary and benefits, including pension, that [plaintiff] would have received from [defendant] had [plaintiff's] rights had not been violated.

In this case, [plaintiff] alleges that [defendant] willfully violated the Family and Medical Leave Act. If [plaintiff] proves to you by a preponderance of the evidence that [defendant's] violation of the Family and Medical Leave Act was willful, then this will have an effect on the damages that you must award. I will explain this effect in a minute, but first I will provide you more information on what it means for a violation to be "willful."

You must find [defendant's] violation of the Family and Medical Leave Act to be willful if [plaintiff] proves by a preponderance of the evidence that [defendant] knew or showed reckless disregard for whether [describe challenged action] was prohibited by the law. To establish willfulness it is not enough to show that [defendant] acted negligently. If you find that [defendant] did not know, or knew only that the law was potentially applicable, and did not act in reckless disregard for whether its conduct was prohibited by the law, then [defendant's] conduct was not willful.

If you find that [defendant's] violation of the Family and Medical Leave Act was willful, then you must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [three years before the date the lawsuit was filed] through the date of your verdict. However, if you find that [defendant's] violation of the Family and Medical Leave Act was not willful, then you must award [plaintiff] the amount of [his/her] lost wages and benefits during the period starting [two years before the date the lawsuit was filed] through the date of your verdict. In other words, [plaintiff] is entitled to lost wages and benefits for an extra year if [he/she] proves that [defendant's] violation was willful.

You must reduce any award of damages for lost wages and benefits by the amount of the expenses that [plaintiff] would have incurred in making those earnings.

If you award damages for lost wages, you are instructed to deduct from this figure whatever wages [plaintiff] has obtained from other employment during this period. However, please note that you should not deduct social security benefits, unemployment compensation and pension benefits

1 from an award of lost wages.

2 [You are further instructed that [plaintiff] has a duty to mitigate [his/her] damages--that is
3 [plaintiff] is required to make reasonable efforts under the circumstances to reduce [his/her]
4 damages. It is [defendant's] burden to prove that [plaintiff] has failed to mitigate. So if [defendant]
5 persuades you, by a preponderance of the evidence, that [plaintiff] failed to obtain substantially
6 equivalent job opportunities that were reasonably available to [him/ her], you must reduce the award
7 of damages by the amount of the wages that [plaintiff] reasonably would have earned if [he/she] had
8 obtained those opportunities.]

9 [In assessing damages, you must not consider attorney fees or the costs of litigating this case.
10 Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore,
11 attorney fees and costs should play no part in your calculation of any damages.]

12
13 **[Add the following instruction if the employer claims “after-acquired evidence” of misconduct**
14 **by the plaintiff:**

15 [Defendant] contends that it would have made the same decision to [describe employment
16 decision] [plaintiff] because of conduct that [defendant] discovered after it made the employment
17 decision. Specifically, [defendant] claims that when it became aware of the [describe the after-
18 discovered misconduct], [defendant] would have made the decision at that point had it not been
19 made previously.

20 If [defendant] proves by a preponderance of the evidence that it would have made the same
21 decision and would have [describe employment decision] [plaintiff] because of [describe after-
22 discovered evidence], you must limit any award of lost wages to the date [defendant] would have
23 made the decision to [describe employment decision] [plaintiff] as a result of the after-acquired
24 information.]

25
26
27 **Comment**

28
29 The Family and Medical Leave Act provides recovery for two years of lost wages and
30 benefits if the defendant’s violation was non-willful; it extends the recovery of damages to a third
31 year if the defendant’s violation was willful. 26 U.S.C. § 2617(c)(2). The standard for “willfulness”
32 is the same as that applied to the liquidated damages provision in the ADEA, and the statute of
33 limitations provision in the Equal Pay Act, i.e., whether the employer “either knew or showed
34 reckless disregard” for the employee’s statutory rights. *See Hoffman v. Professional Med Team*, 394

1 F.3d 414, 417 (6th Cir. 2005) (“the standard for wilfulness under the FMLA extended statute of
2 limitations is whether the employer intentionally or recklessly violated the FMLA.”).

3 This instruction is to be used when the plaintiff presents evidence sufficient to create a jury
4 question on whether the defendant willfully violated the FMLA. See Instruction 10.4.1 for the
5 instruction to be used when there is insufficient evidence to create a jury question on willfulness.

6 29 U.S.C. § 2617(a) provides the following damages for an employee against an employer
7 who violates the FMLA:

8 Any employer who violates section 105 [29 USCS § 2615] shall be liable to any eligible
9 employee affected for damages equal to--

10 (i) the amount of--

11 (I) any wages, salary, employment benefits, or other compensation denied or lost to
12 such employee by reason of the violation; or

13 (II) in a case in which wages, salary, employment benefits, or other compensation
14 have not been denied or lost to the employee, any actual monetary losses sustained
15 by the employee as a direct result of the violation, such as the cost of providing care,
16 up to a sum equal to 12 weeks of wages or salary for the employee;

17 (ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and
18 (iii) an additional amount as liquidated damages equal to the sum of the amount described
19 in clause (i) and the interest described in clause (ii), except that if an employer . . . proves to
20 the satisfaction of the court that the act or omission which violated [the FMLA] was in good
21 faith and that the employer had reasonable grounds for believing that the act or omission was
22 not a violation of [the FMLA], such court may, in the discretion of the court, reduce the
23 amount of the liability to the amount and interest determined under clauses (i) and (ii),
24 respectively;

25 Section 2617(a) authorizes the court to award “such equitable relief as may be appropriate,
26 including employment, reinstatement, and promotion.”

27 In accordance with 29 U.S.C. § 2617(a), the court must double the amount of back pay
28 damages as liquidated damages, unless the defendant persuades the court that the violation was in
29 good faith and that the employer had reasonable grounds for believing that the act or omission was
30 not a violation of the FMLA— in which case the court has the discretion to limit the award to the
31 amount of damages found by the jury.

32 *Attorney Fees and Costs*

34 There appears to be no uniform practice regarding the use of an instruction that warns the
35 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652
36 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if plaintiff

1 wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you
2 award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how
3 much. Therefore, attorney fees and costs should play no part in your calculation of any damages.”
4 *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the
5 instruction, and, reviewing for plain error, found none: “We need not and do not decide now whether
6 a district court commits error by informing a jury about the availability of attorney fees in an ADEA
7 case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons.” *Id.* at 657.
8 First, “it is not ‘obvious’ or ‘plain’ that an instruction directing the jury *not* to consider attorney fees”
9 is irrelevant or prejudicial; “it is at least arguable that a jury tasked with computing damages might,
10 absent information that the Court has discretion to award attorney fees at a later stage, seek to
11 compensate a sympathetic plaintiff for the expense of litigation.” *Id.* Second, it is implausible “that
12 the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the
13 disproportionate step of returning a verdict against him even though it believed he was the victim
14 of age discrimination, notwithstanding the District Court's clear instructions to the contrary.” *Id.*;
15 *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and
16 *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

10.4.3 FMLA Damages — Other Monetary Damages

Model

The Family and Medical Leave Act provides that if an employee is unable to prove that the employer's violation of the Act caused the employee to lose any wages, benefits or other compensation, then that employee may recover other monetary losses sustained as a direct result of the employer's violation of the Act.

So in this case, if you find that [defendant] has violated [plaintiff's] rights under the Act, and yet you also find that [plaintiff] has not proved the loss of any wages, benefits or other compensation as a result of this violation, then you must determine whether [plaintiff] has suffered any other monetary losses as a direct result of the violation. [Other monetary losses may include the cost of providing the care that gave rise to the need for a leave.] [Plaintiff] has the burden of proving these monetary losses by a preponderance of the evidence.

Under the law, [plaintiff's] recovery for these other monetary damages can be no higher than the amount that [he/she] would have made in wages or salary for a twelve-week period during her employment. So you must limit your award for these other monetary damages, if any, to that amount. You must also remember that if [plaintiff] has proved damages for lost wages, benefits or other compensation, then you must award those damages only and [plaintiff] may not recover any amount for any other monetary damages suffered as a result of [describe defendant's conduct].

Finally, the Family and Medical Leave Act does not allow [plaintiff] to recover for any mental or emotional distress or pain and suffering that may have been caused by [defendant's] violation of the Act. So I instruct you that you are not to award the plaintiff any damages for emotional distress or pain and suffering.

[In assessing damages, you must not consider attorney fees or the costs of litigating this case. Attorney fees and costs, if relevant at all, are for the court and not the jury to determine. Therefore, attorney fees and costs should play no part in your calculation of any damages.]

Comment

The Family and Medical Leave Act provides that "in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee [can be recovered by a plaintiff]." 29 U.S.C. §2617(a). An award for these non-wage-related monetary losses is contingent upon the plaintiff's *not* obtaining an award for lost wages. This instruction therefore provides that the jury is to reach the question of monetary losses other than lost wages only if it finds that the plaintiff has not proven damages for lost wages.

1 The FMLA does not provide for recovery for emotional distress or pain and suffering. *Lloyd*
2 *v. Wyoming Valley Health Care Sys.*, 994 F. Supp. 288, 291 (M.D. Pa. 1998) (reasoning that “the
3 statute itself by including ‘actual monetary compensation’ as a separate item of damage places a
4 limited definition on ‘other compensation’”; concluding that “the plain meaning of the statute is that
5 ‘other compensation’ means things which arise as a quid pro quo in the employment arrangement,
6 and not damages such as emotional distress which are traditionally an item of compensatory
7 damages”). See also *Coleman v. Potomac Electric Power Co.*, 281 F. Supp.2d 250, 254 (D.D.C.
8 2003) :

9 Recovery under FMLA is "unambiguously limited to actual monetary losses." *Walker v.*
10 *United Parcel Service, Inc.*, 240 F.3d 1268, 1277 (10th Cir. 2001). Other kinds of damages -
11 punitive damages, nominal damages, or damages for emotional distress - are not recoverable.
12 See *Settle v. S.W. Rodgers Co., Inc.*, 998 F. Supp. 657, 665-66 (E.D. Va. 1998) (punitive
13 damages and damages for emotional distress); *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 772-73
14 & n.1 (M.D.N.C. 2000), aff'd, adopted 127 F. Supp. 2d 770 (M.D.N.C. 2000) (same).

15
16 In accordance with 29 U.S.C. § 2617(a), the court must double the amount of any damages
17 under the FMLA, as liquidated damages, unless the defendant persuades the court that the violation
18 was in good faith and that the employer had reasonable grounds for believing that the act or omission
19 was not a violation of the FMLA— in which case the court has the discretion to limit the award to
20 the amount of damages found by the jury.

21 22 *Attorney Fees and Costs*

23 There appears to be no uniform practice regarding the use of an instruction that warns the
24 jury against speculation on attorney fees and costs. In *Collins v. Alco Parking Corp.*, 448 F.3d 652
25 (3d Cir. 2006), the district court gave the following instruction: “You are instructed that if plaintiff
26 wins on his claim, he may be entitled to an award of attorney fees and costs over and above what you
27 award as damages. It is my duty to decide whether to award attorney fees and costs, and if so, how
28 much. Therefore, attorney fees and costs should play no part in your calculation of any damages.”
29 *Id.* at 656-57. The Court of Appeals held that the plaintiff had not properly objected to the
30 instruction, and, reviewing for plain error, found none: “We need not and do not decide now whether
31 a district court commits error by informing a jury about the availability of attorney fees in an ADEA
32 case. Assuming *arguendo* that an error occurred, such error is not plain, for two reasons.” *Id.* at 657.
33 First, “it is not ‘obvious’ or ‘plain’ that an instruction directing the jury *not* to consider attorney fees”
34 is irrelevant or prejudicial; “it is at least arguable that a jury tasked with computing damages might,
35 absent information that the Court has discretion to award attorney fees at a later stage, seek to
36 compensate a sympathetic plaintiff for the expense of litigation.” *Id.* Second, it is implausible “that
37 the jury, in order to eliminate the chance that Collins might be awarded attorney fees, took the
38 disproportionate step of returning a verdict against him even though it believed he was the victim

1 of age discrimination, notwithstanding the District Court's clear instructions to the contrary.” *Id.*;
2 *see also id.* at 658 (distinguishing *Fisher v. City of Memphis*, 234 F.3d 312, 319 (6th Cir. 2000), and
3 *Brooks v. Cook*, 938 F.2d 1048, 1051 (9th Cir. 1991)).

10.4.4. FMLA Damages — Liquidated Damages

No Instruction

Comment

Punitive damages cannot be recovered under the FMLA. *Zawadowicz v. CVS Corp.*, 99 F. Supp.2d 518, 534 (D.N.J. 2000) (noting that nothing in the FMLA damages provision, 29 U.S.C. § 2617, authorizes an award of punitive damages); *Oby v. Baton Rouge Marriott*, 329 F. Supp.2d 772, 788 (M.D.La. 2004) (same). 29 U.S.C. § 2617 provides for a mandatory award of liquidated (double) damages for any award under the FMLA. No instruction is necessary on liquidated damages, however, because there is no issue for the jury to decide concerning the availability or amount of these damages. The court simply doubles the award of damages found by the jury.

It should be noted that 29 U.S.C. § 2617 provides that if the defendant proves that its conduct was in good faith and that it had reasonable grounds for believing that the act or omission was not a violation of the FMLA, the “court may, in the discretion of the court, reduce the amount of the liability to” the amount of damages found by the jury. No instruction is necessary on good faith, either, because the question of good faith in this circumstance is a question for “the court.” The jury has no authority to reduce an award of liquidated damages under the FMLA. *Zawadowicz v. CVS Corp.*, 99 F. Supp.2d 518, 534 (D.N.J. 2000) (noting that any question of reducing liquidated damages is for the court).

10.4.5 FMLA Damages — Nominal Damages

No Instruction

Comment

Nominal damages are not available under the FMLA. The court in *Walker v. UPS*, 240 F.3d 1268, 1278 (10th Cir. 2003) explained why nominal damages cannot be awarded under the FMLA, in contrast to Title VII, which authorizes an award of nominal damages:

Because recovery [under the FMLA] is . . . unambiguously limited to actual monetary losses, courts have consistently refused to award FMLA recovery for such other claims as consequential damages (*Nero v. Industrial Molding Corp.*, 167 F.3d 921, 930 (5th Cir. 1999)) and emotional distress damages (*Lloyd v. Wyoming Valley Health Care Sys., Inc.*, 994 F. Supp. 288, 291-92 (M.D. Pa. 1998)). Thus *Cianci v. Pettibone Corp.*, 152 F.3d 723, 728-29 (7th Cir. 1998) held that a plaintiff had no claim under the FMLA where the record showed that she suffered no diminution of income and incurred no costs as a result of an alleged FMLA violation.

Invoking an attempted analogy to Title VII precedents, Walker argues that nominal damages should be allowed in FMLA cases because, just as under Title VII, nominal damages would allow plaintiffs whose rights are violated but who do not suffer any compensable damages to vindicate those rights. While it is true that recent cases have rejected the "no harm, no foul" argument in the Title VII context (*see, e.g., Hashimoto v. Dalton*, 118 F.3d 671, 675-76 (9th Cir. 1997)), that was not always so.

Before the 1991 amendments to the Civil Rights Act, nominal damages (as well as damages for pain and suffering or punitive or consequential damages) were not available for Title VII violations, because the statute then provided for equitable and declaratory relief alone. Nominal damages became available only after 42 U.S.C. § 1981a ("Section 1981a," which governs damages recoverable in cases brought under Title VII) was amended to allow for compensatory damages in such actions (nominal damages are generally considered to be compensatory in nature).

Walker's attempted argument by analogy fails because of the critical difference in statutory language between [29 U.S.C.] Section 2617(a)(1) and the amended Section 1981a. In contrast to the latter, . . . Section 2617(a)(1) does not provide for compensatory damages in general, but is instead expressly limited to lost compensation and other actual monetary losses. Because nominal damages are not included in the FMLA's list of recoverable damages, nor can any of the listed damages be reasonably construed to include nominal

1 damages, Congress must not have intended nominal damages to be recoverable under the
2 FMLA.

3 We are obligated to honor that intent and therefore to countenance the award of only
4 those elements of damages that Congress has deemed appropriate to redress violations of the
5 FMLA. Because Walker has admittedly suffered no actual monetary losses as a result of
6 UPS' asserted violation of the FMLA and has no claim for equitable relief, she has no
7 grounds for relief under that statute.

8 *See also Lapham v. Vanguard Cellular Systems, Inc.*, 102 F. Supp.2d 266, 269 (M.D.Pa. 2000)
9 (while plaintiff had a cause of action for interference, she suffered no wage or other monetary loss,
10 therefore “she cannot obtain relief under the FMLA and her claim must be dismissed.”); *Oby v.*
11 *Baton Rouge Marriott*, 329 F. Supp.2d 772, 788 (M.D.La. 2004) (“It is clear that nominal damages
12 are not available under the FMLA because the statutory language of the FMLA specifically limits
13 recovery to actual monetary losses.”).